SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-511

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA IN OPPOSITION

WALLACE L. DUNCAN
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorney for Anderson Power & Light of the City of Anderson, Indiana

Of Counsel:

JACK B. CAMPBELL
City Attorney
City of Anderson
Post Office Box 2100
Anderson, Indiana 46011

FREDRICK D. PALMER
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

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BRIEF FOR RESPONDENT ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA IN OPPOSITION

OPINIONS BELOW

The opinion, judgment and order of the United States Court of Appeals to which the Petition for a Writ of Certiorari is directed are accurately and adequately set forth in the Appendix filed by the Petitioner at pp. 1a and 26a.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, reversing the subject orders of the Federal Power Commission, presents any Federal or Constitutional issue relating to the regulatory jurisdiction of the Federal Power Commission necessitating review by this Court?
2. Whether the United States Court of Appeals for the District of Columbia Circuit correctly applied the principles of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) in reversing the subject orders of the Federal Power Commission?
3. Whether the request by Petitioner for remand to the Commission for further evidentiary hearings is untimely and whether such hearings would serve any useful purpose?

STATUTES INVOLVED

The issues posed in the Petition for a Writ of Certiorari involve Sections 205, 206 and 313 of the Federal Power Act, 16 U.S.C., sections 791 *et seq.*, pertinent portions of which have been set forth by the Petitioner in the Appendix at p. 50(a).

COUNTERSTATEMENT OF THE CASE

Indiana & Michigan Electric Company, the Petitioner herein, was an Intervenor in two different but related appeals initiated by Respondents Anderson Power & Light of the City of Anderson, Indiana, (hereinafter Anderson), and Richmond Power & Light Company of Richmond, Indiana, (hereinafter Richmond), seeking re-

lief from orders of the Federal Power Commission (hereinafter Commission).

Anderson filed a Petition for Review on October 31, 1972, (Appeal No. 72-2035) with the United States Court of Appeals for the District of Columbia Circuit seeking reversal of a portion of an Order of the Commission dated August 11, 1972, entitled "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date", and the further order of the Commission dated October 6, 1972, entitled, "Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading." Earlier, Richmond had filed a similar Petition for Review (Appeal No. 72-1963), seeking review of the same orders of the Commission and raising issues substantially identical to those presented in Anderson's Petition.

By Order of the Court dated December 21, 1972, the referenced petitions were consolidated.[1] Anderson's Petition for Review arose out of the following facts and circumstances:

The City of Anderson is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and owns and operates a municipal electric utility (Anderson Power & Light of the City of Anderson), serving customers within its territorial limits and environs. Anderson purchases all elec-

[1] Indiana & Michigan Electric Company filed its own Petition for Review (Appeal No. 72-2168), with the Court challenging different portions of the same orders of the Commission. Initially, I & M's Petition for Review was consolidated with those of Anderson and Richmond. However, before argument, I & M's Petition was severed due to the different nature of the issues presented. That petition is still pending before the United States Court of Appeals for the District of Columbia Circuit.

tric power it requires at wholesale from Petitioner, a "public utility" within the meaning of Section 201 of the Federal Power Act, 16 U.S.C. § 824(e). All such wholesale sales to Anderson are now subject to the regulatory jurisdiction of the Commission. The present controversy resolves around the interpretation, construction and application of a contract first entered into between Anderson and Petitioner on April 17, 1957, whereby Petitioner agreed to furnish, and Anderson agreed to purchase, electric power at wholesale to meet Anderson's then existing power needs. The rate to be paid by Anderson to Petitioner for wholesale power was and is fixed in the contract by reference to I & M's Tariff IP, available to certain retail industrial customers in Indiana, ". . . as long as said tariff is in effect. . ." [2]

In 1961, representatives of Anderson and Petitioner agreed to study the contract provisions and their joint operations to the end that Anderson might have all the power required for growth and development "at the lowest possible rate" and to accomplish the following objectives:

a. Allow the City to operate the generating plant so as to use only lowest cost fuel both for electric generating and for steam heating service.

b. Revise the contract so as to give the City increased flexibility in scheduling plan operation so as to enable the City to realize the lowest generating cost and lower over-all cost for power.

c. Give the City a source of maintenance power in the event of an emergency breakdown of City's #4 Unit.

d. I & M be required to furnish additional capacity as needed by the City.

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[2] Respondent's Appendix A, at 1a, attached hereto.

e. Assure the City of a long range supply of power at reasonable rates subject to approval by the Public Service Commission of Indiana.[3]

Following said study, certain contract changes were suggested and agreed to and, by letter dated January 2, 1963, Mr. R. E. Doyle, Jr., Vice President of I & M, explained the changes and set forth the contract amendments. The contract amendments were accepted by the Mayor of Anderson on December 11, 1963, and adopted by Anderson's Common Council per Ordinance No. 47-63 dated December 23, 1963.

The contract amendment of 1963 did nothing to affect the continued efficacy of Petitioner's commitment to provide power and energy to Anderson under Petitioner's Tariff IP. The amendment is, however, relevant, notwithstanding Petitioner's disclaimer to the contrary (Petition at 3, fn. 3) since the Petitioner in the amendment committed itself to continue to supply energy to Anderson "at the lowest possible rate", to "[a]ssure the City of a long range supply of power at reasonable rates," and to assure ". . . that the City have all the power required for growth and development . . ." of industry and economic opportunity in Anderson.[4]

In 1957, when the contract was initially executed, and in 1963, when the contract was amended, the Public Service Commission of Indiana had jurisdiction over the wholesale transactions involved herein, the Federal Power Commission not yet having asserted jurisdiction over these transactions under the Federal Power Act. Subsequently, the Commission did assert such jurisdiction (*Indiana & Michigan Electric Co.*, 33 F.P.C. 739 (1965)), and its authority over Petitioner's wholesale electric rates was sustained over Petitioner's challenge. (*Indiana*

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[3] See Respondent's Appendix B, at 1b, attached hereto.

[4] Respondent's Appendix B, at 16.

& Michigan Electric Company v. *F.P.C.*, 365 F.2d 180 (7th Cir. 1965), *cert. denied*, 385 U.S. 972 (1966).

Once the Commission's jurisdiction was established, the subject contract was filed with the Commission as F.P.C. Rate Schedule No. 27. Thereafter, in 1965, the Commission, pursuant to § 206 of the Federal Power Act, undertook an investigation of rates charged by the Petitioner to its municipally owned wholesale customers. (*Indiana & Michigan Electric Co.*, 35 F.P.C. 298 (1966)). Petitioner and Anderson, among others, were parties to that proceeding which was resolved by settlement among the parties. Neither the Commission's investigation nor the resulting settlement had any effect on the contract between Petitioner and Anderson. In this regard, the Court below noted that:

> An order approving an offer of settlement [following the investigation], to which all parties agreed, was issued some two years later. See *Indiana & Michigan Electric Co.*, 39 F.P.C. 272 (1968). Under the settlement, each municipal wholesale buyer was given the option of switching from its present tariff to a new Tariff MRS, thereby obtaining a rate reduction. Evidently most municipalities availed themselves of this option, since when I & M tendered its Rate Schedule WS for filing in June, 1972, the tender indicates that out of 16 municipal wholesale customers the rates of 12 were governed in June 1972 by Tariff MRS. *Notably, Richmond and Anderson were among those municipal buyers that did not take advantage of the opinion and I & M's June 1972 tender states that their rates were still governed by Tariff IP. Anderson Power & Light of the City of Anderson, Indiana* v. *Federal Power Commission*, 481 F.2d 490, 497, fn. 13 (D.C. Cir. 1973). [Emphasis added].

The final transaction between Anderson and Petitioner relevant to the dispute herein occurred in 1969. In that

year, four years after the Commission asserted jurisdiction over Petitioner's wholesale transactions, including the contract at issue herein, Petitioner submitted a proposed new contract to Anderson which provided that electricity would be sold "at the rate and under the provisions of Company's Tariff IP as regularly filed with the Public Service Commission of Indiana . . . so long as said Tariff is in effect." [5] At all times relevant hereto, Tariff IP has been and is in effect in the State of Indiana for sales by Petitioner to its industrial customers. For reasons not relevant here, Anderson declined to accept the proposed amended contract and service was continued under the terms and conditions of the original contract, as amended in 1963, on file with the Commission as FPC Tariff No. 27.

Notwithstanding the subject contract, the amendment thereto and Anderson's refusal to accept any other tariff offered by Petitioner, and notwithstanding the Petitioner's reaffirmation of the contract in 1969, Petitioner, on June 13, 1973, filed with the Commission, pursuant to Section 205 of the Federal Power Act, proposed changes in rates and charges for Anderson, Richmond and other municipal customers. The proposed charges would have supplanted the existing Tariff IP, as to Anderson and Richmond, with Tariff WS, a wholly new tariff, which would have increased wholesale power costs to Anderson by 38%. After notice by the Commission of the changes issued June 23, 1972, Anderson filed a formal protest and petition to intervene on July 3, 1972, and a supplement to its petition to intervene on August 2, 1972. The proposed tariff changes were accepted for filing by the Commission on August 11, 1972, but the effective date thereof was suspended for five months until January 13, 1973. In the same order, the Commission denied Anderson's motion to reject the proposed tariff changes on the

[5] 481 F.2d at 498-99.

basis of the contract between Anderson and the Petitioner. On October 6, 1972, the Commission denied Anderson's Application for Rehearing, whereupon Anderson petitioned the Court of Appeals to review the matter.

As explained more fully hereinafter, the Court of Appeals, on May 25, 1973, reversed the orders of the Commission and remanded the case to the Commission with instructions to reject the proposed tariff changes as to Anderson and Richmond and to implement procedures for the refund of incremental charges unlawfully collected by Petitioner after January 13, 1973. *Anderson Power & Light of the City of Anderson, Indiana* v. *Federal Power Commission*, 481 F.2d 490 (D.C. Cir. 1973).

A Petition for Rehearing filed by the Petitioner was denied and, on September 19, 1973, the Petitioner filed the current Petition for a Writ of Certiorari with this Court.

As hereinbefore noted, Petitioner was an intervenor in the proceedings below, while the Commission was the Respondent. It is relevant to point out that the Commission neither sought rehearing of the decision below, nor petitioned this Court for a Writ of Certiorari.

THE JUDGMENT OF THE COURT OF APPEALS

The Petitioner's description of the decision and judgment below is misleading. After correctly identifying the date the decision issued, the Court from which it issued, the author of the opinion, and correctly citing controlling decisions of this Court, I & M attempts to torture the language of the decision below in a way that leads the reader inexorably to the conclusion that the decision of this Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), is dispositive of the issues herein. In its attempt to bring this case within the principles of the *Memphis*

Decision, the Petitioner makes the following incorrect and misleading assertions respecting the decision of the Court below:

1. That the Court below construed "rate tariff[s] of general applicability . . . to bar rate changes." (Petition at p. 7).
2. That the Court below decided that Petitioner "was barred from filing any rate increase except one." *Ibid.* at p. 7.
3. That the Court below empowered the Public Service Commission of Indiana ". . . to establish a ceiling on the rates which I & M could charge to Anderson and Richmond, despite the fact that I & M's service agreements with them are subject only to Federal jurisdiction". *Ibid.* at p. 7.
4. That the Court below "confected" a "competitive squeeze theory" to reach a construction of contract terms otherwise not justifiable. *Ibid.* at pp. 8 and 12.

Contrary to Petitioner's assertions, the Court below merely applied a "refreshingly simple" rule long established and recognized in previous decisions of this Court.

In the words of the Court below:

> The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid. 481 F.2d at 493.

In reversing the decision of the Commission, the Court below simply applied traditional rules of contract construction and concluded that the subject contracts prohibited unilateral action on the part of Petitioner in filing proposed tariff changes with the Commission during the term of the existing contract.

As to the tortured interpretation of the decision below by Petitioner, it is relevant to note that Tariff I.P. speci-

fied in the Anderson contract is not a tariff of "general applicability", since Petitioner serves only seven Indiana retail customers and three of sixteen Indiana wholesale customers thereunder.[6] As to each of these ten customers, the terms and conditions of the contracts are identical, or nearly so, and are wholly and distinctly different from the numerous tariffs applicable to the myriad other power customers of Petitioner in Indiana.

Contrary to Petitioner's assertion, the Court below did not decide that Petitioner "was barred from filing any rate increase except one", nor did the decision below have the effect of empowering the Public Service Commission of Indiana ". . . to establish a ceiling on the rates which I & M could charge "to Anderson". In point of fact, the Court below decided that Petitioner could file any proposed tariff changes it desires with the PSCI under Tariff IP and implement any changes approved there through a subsequent filing with the Commission subject to its jurisdiction over Petitioner's wholesale sales.[7] The Court also held that the Commission is free, at any time, to conduct an investigation and make findings of its own pursuant to its superior regulatory jurisdiction under Section 206(a) of the Federal Power Act.[8] And, as noted above, this is precisely the procedure followed by the Commission in the 1965 proceedings applicable to all parties hereto.[9]

SUMMARY OF THE ARGUMENT

Anderson, an all-requirements wholesale electric customer of Petitioner, entered into a contract for whole-

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[6] Petition at p. 7, fn. 6. Auburn, Indiana is the third municipal system served under Tariff I.P.

[7] See 481 F.2d at 500-01.

[8] *Id.*

[9] *Id.*

sale electric service with I & M in 1957. While the contract has been amended, as hereinbefore described, the contract has been automatically renewed and remained in full force and effect at all times relevant to these proceedings and cannot be terminated by either party until April 17, 1975, upon two (2) years notice properly given under the express terms and conditions of the contract.

Said contract specifically provides that Anderson shall receive electric service under Petitioner's "Tariff IP" [10] which tariff also applies to sales made at retail to Petitioner's own retail industrial customers.

Sales to Anderson under Tariff IP are subject to regulation by the Federal Power Commission pursuant to the Federal Power Act. Sales to Petitioner's own industrial retail customers pursuant to Tariff IP are subject to the regulatory jurisdiction of the Public Service Commission of Indiana (sometimes referred to hereinafter as PSCI).

The subject contract specifically provides that Petitioner is to provide electric service to Anderson ". . . at the rate and under the provisions of the regularly filed and published tariff selected by the Customer (Anderson) and known as Tariff IP . . ., as long as said tariff is in effect . . ." Petitioner's Tariff IP is still in effect, and Anderson and all of Petitioner's industrial power customers were served thereunder until Petitioner sought, unilaterally, to change the tariff applicable to Anderson. Anderson has never agreed to take service under any other tariff, nor has Anderson agreed to allow Petitioner to substitute tariff provisions or otherwise alter, modify, abrogate or amend the contract unilaterally.

Notwithstanding the aforementioned contract, Petitioner, on June 13, 1972, filed proposed changes in rates and charges seeking Commission approval. Said proposed

[10] Respondent's Appendix A, at page 1.

changes in tariff provisions would have removed Anderson from Tariff IP and placed Anderson under a wholly new tariff (Tariff WS), changing the terms and conditions of the contract.

This attempted filing, Anderson asserts, clearly violates the principles enunciated and established by the Supreme Court of the United States in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The decision of the Court below reversing the Orders of the Commission accepting the proposed tariff changes was, therefore, correct. Anderson further asserts that no issue is presented here relating to the Commission's jurisdiction since the operative effect of the decision below allows Petitioner to continue to seek rate increases pursuant to Sections 205(c)(d) and (e) of the Federal Power Act and the Commission to initiate on its own investigation of Tariff IP pursuant to Section 206(a) of the same Act.

Anderson further submits that the decision below was supported by substantial evidence in the form of all relevant contractual documents and amendments thereto, correspondence relevant to the same contractual documents, a unilateral offer by Petitioner to amend the subject contract in 1969 (similar in form to the original contract and thus reaffirming the parties' intent), and proceedings before the Federal Power Commission in 1965 and 1968 which were susceptible of judicial notice by the Court below.

In the light of this substantial evidence, Anderson submits that no useful purpose would be served by remand to the Commission for further "fact finding" as requested by Petitioner.

Finally, Anderson urges that Petitioner's belated request for remand before the Court below during oral

argument, a reversal of its position before the Commission and "on brief" before the Court of Appeals, renders the present request for remand untimely and defective within the meaning of Section 313(b) of the Federal Power Act.

ARGUMENT I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT REVERSING THE SUBJECT ORDERS OF THE FEDERAL POWER COMMISSION, PRESENTS NO FEDERAL OR CONSTITUTIONAL ISSUES RELATING TO THE REGULATORY JURISDICTION OF THE FEDERAL POWER COMMISSION AND NEED NOT BE REVIEWED BY THIS COURT.

The Petitioner, in its distorted and convoluted statement of the facts and issues, attempts to confuse and obfuscate the central issue in these proceedings and breathe an appearance of importance into an otherwise simple and mundane matter of contract construction under the principles established by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Anderson submits that the characterization of this dispute by the Court below is correct, *i.e.*, that the dispute herein is "refreshingly simple", and "the contract between the parties governs the legality of the filing." [11]

The Petitioner herein attempts to elevate this contract dispute to the level of a major controversy concerning the parameters of the Commission's regulatory jurisdiction. Anderson submits that the importance of the issues herein should be assessed in light of the Commission's absence in the present proceedings since the Commission

[11] 481 F.2d at 493.

has a far greater understanding of its own regulatory duties, powers and needs than does the Petitioner. Anderson submits that the Court below, in reversing the Orders of the Commission, did nothing more than follow the prior decisions of this Court in delineating the Commission's powers and duties in dealing with wholesale electric power contracts under the Federal Power Act.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), this Court, for the first time, set aside orders of the Commission permitting increases in rates for energy supply above those prescribed in contracts between the supplier and its wholesale customer. In *Mobile*, the Court construed Sections 4(c), (d) and (e) and Section 5(a) of the Natural Gas Act,[12] which gives the Commission regulatory jurisdiction over wholesale rates of natural gas companies. The contract in question contained wholesale rate provisions for natural gas to be sold by the supplier to a distributing company. Subsequently, the supplier, without the consent of the distributor, filed new rate schedules with the Commission.

This Court disapproved the Commission's acceptance of the new rates for filing, and the Commission's allowing the new rates to take affect, and held that the filings were a substantive nullity. This Court went on to point out, however, that the Commission did have the power to change contractual provisions pertaining to rates, but only after a specific finding that the contractual rate was "unjust, unreasonable, unduly discriminatory or preferential" under § 5(a) of the Natural Gas Act.[13]

In *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), a decision handed down the

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[12] 15 U.S.C., §§ 717 (c) & (d).

[13] *Id.*

same day as *Mobile*, this Court considered the jurisdiction of the Commission under Sections 205(c)(d) and (e) and Section 206(a)[14] of the Federal Power Act, which are substantially similar to the corresponding sections of the Natural Gas Act. In *Sierra*, the subject bulk power supply contract between a producer and a distributor specified a low wholesale rate designed to forestall or discourage competition from another source. Later, and while the contract remained effective, the producer filed a new rate schedule with the Commission seeking to increase its rates to the distributor by some 28%. The Commission approved the new rate after finding, upon investigation, that it was not unjust, unreasonable, unduly discriminatory or preferential under Sections 205(c)(d) and (e) of the Federal Power Act.

Notwithstanding the fact that the Commission's findings were equivalent to those provided for and authorized under Section 206 of the Act, the Court nevertheless set aside the Commission's order following the precedent of *Mobile* and concluded further that, as a matter of law, it is not sufficient justification, even under section 206(a), for the Commission to permit an upward rate adjustment merely because the contract between the parties is not profitable to the public utility.

In *Sierra*, the following criteria were set down for a proper determination under Section 206(a) of the Act:

> In short, the Commission holds that the contract rate is unreasonable solely because it yields less that [sic] a fair return on invested capital. But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return in that, if it does so, it is entitled to be relieved of its im-

[14] 16 U.S.C., §§ 824 (d) & (e).

> provident bargain . . . In such circumstances, the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. 350 U.S. at 354-355. (Citations omitted). (Emphasis original).

During the pendency of the proceedings herein, neither the Petitioner nor the Commission have asserted that the rate fixed by Tariff IP is "so low as to adversely affect the public interest."

There has been a plethora of litigation involving the principles enunciated in *Mobile* and *Sierra*.[15] In these cases, neither this Court nor lower Federal courts have made any significant retreat from the doctrine there established. These impressive precedents notwithstanding, the Petitioner continues to ignore the doctrine and suggests no adequate rationale for avoiding the application of these principles herein.

In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court upheld the authority of the Com-

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[15] See, *e.g.*, *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. denied, sub nom., Michigan Wisconsin Pipeline Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005; *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 895 (1957); *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755 (4th Cir. 1957); *Natural Gas Pipe Line Co.* v. *Federal Power Commission*, 253 F.2d 3 (3d Cir. 1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir., 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962); *Superior Oil Co.* v. *Federal Power Commission*, 322 F.2d 601 (9th Cir., 1963); *Shell Oil Co.* v. *Federal Power Commission*, 334 F.2d 1002 (3rd Cir. 1964); *Pan-American Petroleum Corp.* v. *Federal Power Commission*, 352 F.2d 241 (10th Cir., 1965); and *Jupiter Corporation* v. *Federal Power Commission*, 424 F.2d 783 (D.C. Cir. 1969).

mission to impose both maximum and minimum area pricing standards for the sale of natural gas, thus abrogating, in part, existing price standards fixed by existing contracts. However, this Court specifically found that the Commission had made a proper finding under Section 5(a) of the Natural Gas Act, as required by *Mobile* and *Sierra*, justifying the modification of existing contracts. At the same time, the vitality of the *Mobile-Sierra* doctrine was reaffirmed:

> [T]he Commission may not abrogate existing contractual arrangements unless the contract price is so 'low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory . . .' It follows that the Commission was here without authority to abrogate existing contract prices unless it first concluded that they 'adversely affect the public interest' . . . The Commission found that field prices . . . had such consequences . . . 390 U.S. at 820-21. (Citations omitted).

While this Court has recognized certain exceptions to *Mobile-Sierra*, these cases invariably fall in one of four distinct categories, none of which is applicable here, *e.g.*:

(1) Cases in which the Commission has made a *proper* finding under Section 5(a) of the Natural Gas Act that existing contract rates are not in the public interest within the criteria set forth in *Sierra*; (2) cases in which the Commission has additional statutory authorization to order changes in terms and conditions other than rates in utility service contracts;[16] (3) cases

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[16] See, *e.g.*, *Federal Power Commission* v. *Louisiana Power & Light Co.*, —— U.S. ——, 32 L.Ed.2d 369 (1972), where this Court rejected arguments that the Commission lacked jurisdiction to order natural gas companies facing gas shortages to develop and submit curtailment plans for delivery arrangements for all

in which the subject contract itself empowers the utility to make application for rate increases under Sections 205(c)(d) and (e) of the Federal Power Act or Sections 4(c)(d) and (e) of the Natural Gas Act,[17] and (4) in which cases the Commission's order in no way impinges on existing contractual rights.[18]

Anderson submits that the present cause falls in none of the four categories above described. Rather, Anderson's contract with the Petitioner is identical in its operative effect, if not by its precise terms, to the contracts considered in both *Mobile* and *Sierra*.

Petitioner's confusion concerning the regulatory jurisdiction of the Commission herein perhaps stems from the

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gas customers, notwithstanding the presence of inconsistent delivery provisions in existing contracts. The Court cited the Commission's "transportation jurisdiction" and "broad mandate" under section 16 of the Natural Gas Act in reaching the decision. See, also, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *Federal Power Commission* v. *Amerada Petroleum Corporation*, 379 U.S. 689 (1965); and *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1957), all of which are cited by Petitioner, but none of which are applicable here since the decisions there dealt with private attempts to define, by contract, the meaning of "interstate" sales in obvious attempts to divest the Commission of its Congressionally defined jurisdiction.

[17] See, *e.g.*, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). See further discussion of *Memphis*, *infra*, p. 23.

[18] See, *e.g.*, *Sun-Ray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 167 (1970), where petitioner attacked a decision of the Commission to issue a certificate of public convenience, unlimited in time, where petitioner's executed service contract was for a term of 20 years. Petitioner contended that the certificate, as issued, was tantamount to an extension of the contract in violation of *Mobile* and *Sierra*. The Court disagreed, pointing out that, during the life of the contract, its operative effect would be unimpaired. The Court acknowledged that the Commission's action made it incumbent upon petitioner to make a showing after the 20-year contract period that the service should be allowed to abate. The Court pointed out, ". . . we do not see how this in any way disturbs the contract during its term."

fact that Petitioner, by contract, chose to fix the tariff rate applicable to Anderson to the Tariff I.P. rate *now applicable* to and *in effect* for certain industrial retail customers of Petitioner in Indiana on file with the Public Service Commission of Indiana. The Petitioner reasons that the regulatory jurisdiction of the Commission is impaired or diminished if the Court recognizes and gives effect to the literal terms and conditions of the contract. But this is the same argument and the same reasoning employed by the Commission itself in the *Mobile-Sierra* controversies, where the Commission argued that the Natural Gas Act and the Federal Power Act vested the Commission with jurisdictional powers which transcend the contractual commitments and obligations of those subject to its *jurisdiction*.

This Court rejected the argument, first in *Mobile*, as quoted below, and subsequently by implication in *Sierra*. In *Mobile*, the Court treated the argument as follows:

> [T]here is] . . . no support to [the Commission's . . . characterization of § 4(d) and (e) as establishing a rate-changing "procedure"—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change. Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. . . . In short, the Act provides no 'procedure' either for making or changing rates, it provides only for *notice* to the Commission of the rates established by natural gas companies and for review by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act. 350 U.S. at 343. (Emphasis original.)

And further:

> [D]enying to [public utilities] . . . the power unilaterally to change their contracts *in no way impairs the regulatory powers of the Commission*, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. *The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.* 350 U.S. at 344. (Emphasis supplied.)

Notwithstanding the clear impact and applicability of *Mobile-Sierra* in the present case, Petitioner seeks to confuse the issue and create doubt by reference to the duality of jurisdiction between PSCI and the Federal Power Commission under Petitioner's current contracts. However, the PSCI's involvement is inevitable under these contracts since Petitioner, *by its own choice*, made Tariff IP available both to jurisdictional wholesale customers and non-jurisdictional retail customers and is bound by this commitment throughout the term of its contract with Anderson.

But, as recognized by the Court below,[19] the initial involvement of PSCI in passing on changes in Tariff IP in no way divests the Commission of its jurisdiction. Any change in Tariff IP, as it may apply to wholesale customers, is subject to review by the Commission in proceedings under Section 205(d) and (e) of the Act.[20] In the alternative, if the contract rate is unreasonably

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[19] 481 F.2d at 497.

[20] In point of fact, the Petitioner, on August 30, 1973, filed proposed tariff changes applicable to Anderson and Richmond which are identical to those approved by the Public Service Commission of Indiana on March 29, 1972, for application to Petitioner's retail sales under Tariff IP. These proposed changes, including an upward adjustment in rates by some 10.2%, were approved by the Commission on September 28, 1973, and became effective on September 30, 1973.

low, the Commission has authority to initiate, on its own motion, a proceeding under Section 206(a) in accordance with the standards set forth in *Sierra*.

As the Court below indicated, the latter procedure was utilized by the Commission in 1965 through 1968, where an investigation was undertaken to review rates, charges and terms and conditions of service under which Petitioner sold electric power at wholesale for resale to all municipal customers.[21] This is the precise procedure which the Supreme Court suggested in *Sierra* for situations in which rates are fixed by contract during the contract term. The result of the investigation was two pronged:

(1) The Commission expressly found that providing wholesale service under Tariff IP did not "adversely affect the public interest";

(2) The parties reached a contractually binding settlement agreement which was approved by the Commission under Section 206(a) pursuant to *Sierra*. Under the settlement agreement Anderson continued to take service under Tariff IP. In short, Anderson's contractual rights were reaffirmed by the Petitioner and the Commission. The question of a duality of jurisdiction between the Commission and PSCI was apparently neither raised nor considered. (See 481 F.2d at 497, fn. 13.)

Thus, the decision below presents none of the "invidious" evils perceived and forecast by the Petitioner. As demonstrated, neither the jurisdictional powers nor regulatory potency of the Commission are in jeopardy here. The Commission itself, by virtue of the fact that it fails to join Petitioner in attacking the decision below, appears satisfied that there is no substantial encroachment upon

[21] 481 F.2d at 492, fn. 13.

its powers and prerogatives under the Federal Power Act. Stripped of its spurious trappings, the Petitioner's argument reflects dissatisfaction with what has apparently become an unattractive business commitment voluntarily entered into by the Petitioner in 1957 and reaffirmed several times since that date.

As this Court explicitly recognized in *Mobile-Sierra*, the parties to bulk power supply contracts are free to fix rates and terms and conditions of service by contract in any way they see fit, subject always to the regulatory jurisdiction and approval of the Commission under Sections 205(d) and (e) and Section 206(a) of the Federal Power Act. The parties herein have done nothing more nor less than submit to a mutually binding agreement, and Anderson submits that, since no significant question of regulatory law is presented, no compelling reason exists for this Court to involve itself in what is purely and simply a contract dispute.

ARGUMENT II

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CORRECTLY APPLIED THE PRINCIPLES OF *UNITED GAS PIPE LINE CO.* v. *MOBILE GAS SERVICE CORPORATION*, 350 U.S. 332 (1956) AND *FEDERAL POWER COMMISSION* v. *SIERRA PACIFIC POWER CO.*, 350 U.S. 348 (1956) IN REVERSING THE SUBJECT ORDERS OF THE FEDERAL POWER COMMISSION.

As a secondary legal position, Petitioner asserts that, if the principles enunciated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, *supra*, and *Federal Power Commission* v. *Sierra Pacific Power Company*, *supra*, are applicable at all, the Court below erroneously applied these principles to the contracts in question.

In this regard, Petitioner contends that the *Mobile-Sierra* doctrine should be limited in application to those contracts containing tariff provisions defined in dollars and cents figures.[22] This specious contention is arrived at by an extremely restrictive reading of *Mobile* and *Sierra*, and an extremely expansive reading of *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division* 358 U.S. 103 (1958), the third and latest of the trilogy of cases relating directly to the issues herein.

In essence, Petitioner argues that *Mobile* and *Sierra* should be confined to their respective facts and applied only in identical cases in which the rates for the commodity in question are "fixed" and definable in terms of dollars and cents. At the same time, Petitioner essentially urges that the principles of *Memphis* should *always* be applied where bulk power supply contracts make provision for *any* future escalation of rates or changes in the terms and conditions of service regardless of the circumstances.

Anderson submits that this argument, if accepted, would essentially nullify *Mobile-Sierra*, do violence to the plain wording of the Anderson—I & M contract, ignore the elementary precepts of the law applicable to the interpretation of contracts and would be wholly without foundation under any conceivable interpretation of the Federal Power Act or the case law thereunder.

It is a well established principle that a contract is enforceable where the terms thereof are sufficiently definite to ascertain the full meaning of the contract with reasonable certainty.[23] Petitioner does not argue that the Anderson—I & M contract is unenforceable due to vagueness. Indeed, any such argument would be untenable in

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[22] Petition at pp. 9-13.

[23] Am. Jur. 2d, Contracts, § 76, page 415.

light of the contract language which plainly binds the parties to the terms and conditions (including rates) applicable under Tariff IP ". . . as long as said tariff is in effect." The express language of the contract speaks for itself.

The Petitioner, obviously recognizing the effect of the contract language, seeks to extricate itself from the obligations occasioned thereby through the vehicle of urging the adoption of new standards of contractual interpretation for contracts between regulated utilities and their wholesale customers.

In this regard, Petitioner points to the language in the subject contract which does refer to the replacement of Tariff IP by a "new" or "revised" tariff by Petitioner and, on this basis, concludes that *Memphis* is applicable.

Petitioner's contention, however, conveniently overlooks the commitment made by Petitioner to serve Anderson under Tariff IP "as long as said Tariff is in effect," irrespective of what might occur in future proceedings under the Federal Power Act. There is no dispute that the tariff is still in effect, and that it has not been supplanted by a "new" or "revised" tariff.

Moreover, Petitioner refuses to acknowledge the factual difference between *Memphis* and the case at bar. In this regard, the rate contract at issue in *Memphis* provided, in part, that:

> All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . *or any effective superseding rate schedules, on file with the Federal Power Commission.* This agreement in all respects shall be subject to the applicable provisions of such *rate schedule . . . filed with the Federal Power Commission. . . .*[24] (Emphasis supplied.)

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[24] 358 U.S. at 109.

Thus, the contract in *Memphis* went far beyond authorizing a future rate increase triggered by some future event. It specifically authorized the filing of superseding rate schedules with the Federal Power Commission, the precise event that triggers a proceeding under Section 4(d) and (e) of the Natural Gas Act or under Section 205(c) and (d) of the Federal Power Act, depending on the nature of the regulated utility.

The contract between Anderson and the Petitioner, on the other hand, is clearly distinguishable. There is no reference therein to the role to be played by the Federal Power Commission or the filing of rate schedules or amendments therewith. The regulated utility in *Memphis* did not bargain away its ability to seek rate increases under "new" or amended tariffs. By way of contrast, Petitioner has contracted away this option during the term of the contract by agreeing to serve Anderson under Tariff IP "so long as said tariff is in effect."

The theory here espoused by the Petitioner wholly ignores three relevant and compelling decisions decided after *Mobile-Sierra*. In *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F.2d 919 (D.C. Cir. 1960), the Court enforced a contractual settlement agreement which resulted from an ancillary judicial proceeding. The prevailing rate standards were based on the terms of the settlement agreement in the proceeding. Thus, the *Mississippi River* decision establishes the applicability of *Mobile-Sierra* to contracts where rates are "fixed" by reference to extra-contractual events and standards. The rates there were not "fixed" in terms of dollars and cents.

In both *Texas Gas Corporation* v. *Federal Power Commission*, 250 F.2d 27 (D.C. Cir. 1957), and *Shell Oil Company* v. *Federal Power Commission*, 334 F.2d

1002 (3rd Cir. 1964), the Court was called upon to interpret contracts in which the commodity rate was subject to increase should certain future contingencies occur. The applicability of the *Sierra-Mobile* doctrine was never in issue in these cases inasmuch as it was assumed, and properly so, that the contracting parties had the unrestricted right to condition their respective contractual rights upon events which may occur in the future. The viability of basing such changes on conditions subsequent in power purchase contracts was thus sustained under established principles of the law of contracts. These decisions, while recognizing the freedom of the parties to contract, also recognize the jurisdiction of the Federal Power Commission to approve or disapprove any change in terms and conditions of service, including rates, under contract which accommodate such changes during the term of the contract. Anderson has recognized this authority of the Commission throughout these proceedings in conceding that the contract between Anderson and the Petitioner would accommodate such changes as may be consistent with changes made in Tariff IP.

Again, Petitioner chose to permit Anderson to take its wholesale power under Tariff IP during the term of the contract. This right was subject to only one condition; *i.e.*, the existence of Tariff IP during the contract term. Since Petitioner continues to provide service to its own retail customers under Tariff IP, it is obligated under its contract to extend the same conditions of service and the same rates for power to Anderson until expiration of the contract. The attempted unilateral change in the contract executed in 1957, amended in 1963 and reaffirmed by negotiated settlement in 1967, was therefore unlawful.

These facts and circumstances notwithstanding, Petitioner persists in the argument that the decision below

was based upon "insufficient evidence" [25] and that (1) the Court below "confected" a "parity" theory in justifying the construction placed on the contract; [26] and (2) the Court below erroneously looked to Indiana law as an additional aid in interpreting the intent of the parties in entering into the subject contract.[27] Both of these specifications of error must fail.

In this regard, the lower Court's discussion of rate "parity" recognized Anderson's contention that it was entitled to protection against discriminatory rate structures so as to ensure Anderson a competitive posture in attracting new industry and commercial enterprises to the City. The Court neither established, nor sought to establish any new principle or to venture beyond the record. The discussion merely sets forth obvious economic factors present in the operation of all utility systems.

Yet, Petitioner asserts that the Court's observation is "without any factual support." [28] This contention, of course, presupposes that factual support is needed for the Court below to take cognizance of simple economic reality. Petitioner also asserts that ". . . a customer always has 'an interest' in avoiding a rate increase." [29] At the same time, and as the Court below discussed, a party to a long-term bulk power supply contract also has a legitimate interest in preserving the viability of its contract.

The lower Court's discussion of rate "parity" as a factor to be considered in construing the intent of the

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[25] See Argument III, *infra*.

[26] Petition at p. 12.

[27] Petition at p. 22.

[28] Petition at p. 12.

[29] Petition at p. 13.

parties is nothing more than a recognition of the fact that Anderson had a legitimate economic interest in entering into a long range power supply contract. The Court below quite correctly recognized Anderson's need to keep its electric rates as low as possible in order to insure the long term health of its electric system and the municipal area served thereby. If Anderson was not able to offer rates reasonably competitive with industrial rates offered by Petitioner and other power suppliers, new industry would lack incentive to locate in Anderson. This type of economic interest has been recognized as valid in the recent decision of this Court in *Otter Tail Power Company* v. *United States*, —— U.S. ——, 35 L.Ed. 359 (1973).

More importantly, the Petitioner is wholly incorrect in asserting that there is no "factual support" [30] for the lower Court's observation that Anderson has a legitimate economic interest in securing competitive rates. As noted in the foregoing Counterstatement of the Case, Anderson and Petitioner amended the subject contract in 1963, and, as part of the amendment, Petitioner committed itself to continue to supply energy to Anderson "at the lowest possible rate"; to "[a]ssure the City of a long range supply of power at reasonable rates"; all to assure ". . . that the City have all the power required for growth and development . . ." [31] Anderson submits that the statement of its economic interests in maintaining the viability of the present contract is clear and that the Court quite properly took this into account in determining the intent of the parties to be bound thereby. Thus, the Petitioner's assertion that the Court below had no facts upon which to measure Ander-

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[30] Petition at p. 12.

[31] See p. 4, *supra*. And see Respondent's Appendix B attached hereto.

son's economic interest in the contract is without foundation.

In any event, it cannot be stated, as Petitioner urges, that the Court below decided the case on the basis of any "new theory". At all stages of the proceedings below, both the Commission and the Court had before them the current contract, including the 1968 amendments. The Court below, under these circumstances, properly concluded that where, as here, the language of a contract is clear and unambiguous, the words will be given the efficacy demanded by their plain meaning and resort to evidence beyond the contract terms is unnecessary.[32]

Petitioner's second assignment of "evidentiary error" is likewise without merit. Specifically, Petitioner objects to the Court's reference to Indiana law in determining the intent of the parties. While probably unnecessary, the reference to Indiana law was entirely proper when considered in light of the fact that the Public Service Commission of Indiana had jurisdiction over transactions between Anderson and the Petitioner at the time of the execution of the contract.[33]

The lower Court's analysis of Indiana law was also necessitated by the fact that the Commission, in refusing to uphold the contract, had reasoned that, since the contract was executed when PSCI had jurisdiction, the subsequent assertion of jurisdiction by the Commission abrogated and nullified the contract.[34]

This contention was properly rejected by the Court below on both legal and factual grounds. The Court

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[32] *Climaco Calderon* v. *Atlas Steamship Co., Ltd.*, 170 U.S. 272 (1897); *Plymouth Mutual Life Insurance Co.* v. *Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3d Cir. 1967).

[33] See 481 F.2d at 494-95.

[34] *Id.*

first observed that the Commission's conclusion on this issue:

> . . . [I]s beside the point. The issue under Memphis is not whether the parties contemplated change by the appropriate regulatory authority, for under the law every electric power contract must contemplate such change. Instead, the question is whether the parties contemplated that the seller could unilaterally effect a change in the rate simply by filing a new tariff with the appropriate regulatory agency. (481 F.2d 499.)

The observation by the Court is unassailable.[35] Moreover, this analysis would appear consistent with the Commission's own policy statement respecting the Federal-State dichotomy in utility regulation:

> . . . With the State-Federal regulatory dichotomy, equity and fairness demand that classes of customers subject to one jurisdiction be neither preferred nor penalized in relation to those subject to the other jurisdiction. *Duke Power Company*, FPC Opinion No. 64, (December 18, 1972), at p. 5.

Unfortunately, this policy was apparently not yet formulated when the Commission decided the *Anderson* case. Anderson was clearly "penalized" while Petitioner's retail industrial customers were "preferred" as a result of the regulatory dichotomy.

The Court below corrected this inequity, and Anderson submits that it was necessary, in reviewing the Commission's orders, for the Court below to examine the applicable procedures under Indiana laws for modifying utility tariffs. This was so since Anderson had executed its contract prior to the time the Commission asserted its jurisdiction in the premises and, on that

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[35] See *United Gas Pipe Line* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 110 (1958).

basis, the Commission concluded that the reference to the PSCI in the contract therefore had no effect once federal jurisdiction was established. But, as the Court pointed out,[36] Indiana law contemplates tariff changes in proceedings comparable to those under Section 206 of the Federal Power Act,[37] and, therefore, the Commission's conclusion that the reference to PSCI is irrelevant was thereby shown to be incorrect.[38]

The Petitioner also complains that ". . . there was no evidence and no agency fact-finding as to the rate changing procedures that the parties 'contemplated' ".[39] With all due respect for counsel for Petitioner, this assertion is simply false. The procedures for tariff changes were well known to the parties when the contract was initiated. Of necessity, those procedures, with respect to wholesale tariffs, were modified when the Commission asserted jurisdiction over wholesale transactions in 1965. Yet, as Petitioner is well aware, as late as 1969, well after the duality of Commission—PSCI jurisdiction was established, the Petitioner tendered to Anderson a new contract which provided expressly that electricity would be furnished ". . . at the rate and under the provisions of Company's Tariff IP as regularly filed with the Public Service Commision of Indiana"[40]. As noted by the Court below:

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[36] 481 F.2d at 500.

[37] *Id.*

[38] Note: Petitioner's assertion that the Court below misread Indiana law is incorrect (see Petition at p. 22). The fact that the PSCI has the power to change rates in an "emergency" *is* irrelevant here. For, under *Mobile* and *Sierra* and Section 205 of the Federal Power Act, it is the *regulated utility*, and *not* the Commission, that has the power to effectuate tariff changes. The cited authority of the PSCI to order rate changes is analogous to the emergency powers of the Commission under Section 202 of the Federal Power Act.

[39] Petition at p. 22.

[40] See Respondent's Appendix C attached hereto.

> The obvious truth of the matter is that Anderson, like Richmond, intended to key its rates to those charged by I & M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond. *Any uncertainties one might have as to what the contracting parties intended are set to rest by the fact that in 1969, some four years after it had become clear the Federal Power Commission was the appropriate regulatory body, I & M tendered to Anderson for its approval a contract . . . identical with the Richmond—I & M contract . . . 481 F.2d* at *501.* (Emphasis added).

While Anderson, for reasons not relevant here, did not execute the contract tendered in 1969, its submission by the Petitioner, in light of all other facts and circumstances, is strong evidence, if not conclusive evidence, of the parties' intentions relative to their contractual relationship.[41] On this basis alone, this Court should refuse to review the decision of the Court below.

ARGUMENT III

THE REQUEST BY PETITIONER FOR REMAND TO THE COMMISSION FOR EVIDENTIARY HEARINGS IS UNTIMELY AND WOULD SERVE NO USEFUL PURPOSE.

The Petitioner, in a remarkable retreat from the position initially advanced before the Commission and, on brief, before the Court of Appeals below, now seeks reversal and remand of the controversy to the Commission by alleging that the Court below considered facts not part of the record in reversing the Orders of the Com-

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[41] See *Williston, Contracts* § 723 (3 Ed. 1961). Anderson further submits that the execution of the Richmond—I & M contract is strong probative evidence of the intention of the parties to the Anderson—I & M contract. The former contract, of course, was executed *after* the Commission asserted jurisdiction over I & M's wholesale sales.

mission.[42] The Petitioner urges remand for "fact finding" at this late stage of the controversy, notwithstanding that this procedure was never suggested by Petitioner in proceedings before the Commission and that Petitioner actually opposed Commission "fact finding" on brief before the Court below. Petitioner first beat its hasty retreat on the subject of further fact finding during its rebuttal argument before the Court below, its counsel apparently sensing that the panel was incredulous at Petitioner's suggestion that it can, at will, unilaterally cancel or change the terms and conditions of its bulk power supply contracts.

Curiously, the Petitioner relies on Section 313(b) of the Federal Power Act in urging summary reversal and remand to the Commission for further fact finding. Section 313(b) of the Federal Power Act, if relevant at all, would actually preclude Petitioner from raising this issue at this stage of the proceedings:

> . . . No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do . . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there was reasonable grounds for failure to adduce such evidence in proceedings before the Commission, the Court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper . . .

At no time herein did the Petitioner "apply to the Court [below] for leave to adduce additional evidence".

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[42] Petition, Point II, at p. 17.

Nor did the Petitioner make any attempt to demonstrate that there is any reasonable ground for its failure to do so. What the Petitioner did do, at the end of oral argument before the Court below, was to abandon the position taken on brief that evidentiary hearings were not needed, and make a frantic request for remand without showing that any "such additional evidence is material." Moreover, in making its belated request for remand, Petitioner wholly failed to inform the Court below what additional evidence it wished to adduce.[43] Under these circumstances, the Court below quite properly ignored the Petitioner's suggestion and proceeded to decide the case on the basis of the record before the Court and Commission which included the contracts in question and all relevant correspondence and background material pertaining to the contracts and the parties' intent with respect thereto.

As has been shown, this information, evidence and material provided more than sufficient evidence for the conclusions reached below by the Court of Appeals and additional "fact finding" would, therefore, be superfluous and an unnecessary burden on all parties to these proceedings.

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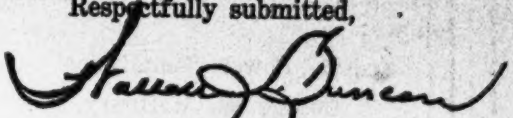
[43] See Section 313(b) of the Federal Power Act.

CONCLUSION

For each of the foregoing reasons, the Petition for a writ of Certiorari should be denied.

Respectfully submitted,



WALLACE L. DUNCAN
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorney for Respondent Anderson Power & Light of the City of Anderson, Indiana

Of Counsel:

JACK B. CAMPBELL
City Attorney
City of Anderson
Post Office Box 2100
Anderson, Indiana 46011

FREDRICK D. PALMER
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

October 19, 1973

CERTIFICATE OF SERVICE

I, Wallace L. Duncan, hereby certify that on October 19, 1973, the Brief for Respondent in Opposition in the above-captioned proceeding was served upon counsel by mailing a copy by first class mail, postage prepaid, as follows:

Federal Power Commission

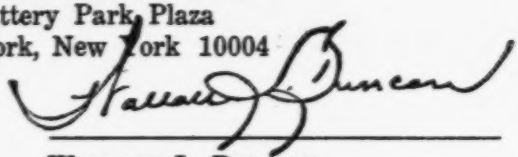
George W. McHenry, Jr.
Acting Solicitor
Federal Power Commission
825 North Capitol Street
Washington, D. C.

Richmond Power & Light of the
City of Richmond, Indiana

George Spiegel
Sandra Strebel
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

Indiana & Michigan Electric Company

Whitney North Seymour
Richard M. Dicke
Peter J. Schlesinger
Lindsay A. Lovejoy, Jr.
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004



WALLACE L. DUNCAN
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Respondent Anderson Power and Light of the City of Anderson, Indiana

October 19, 1973

APPENDIX A

THIS AGREEMENT entered into this 17th. day of April, 1957 by and between the INDIANA & MICHIGAN ELECTRIC COMPANY, hereafter called the Company, and City of Anderson, by and through its Board of Public Works of Anderson, Indiana successors or assigns, hereafter called the Customer,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree with each other as follows:

The Company agrees to furnish to the Customer, during the term of this agreement, and the Customer agrees to take from the Company, subject to its regularly filed standard Terms and Conditions of Service appearing on the following pages, which are hereby incorporated in this agreement, all the electric energy of the character specified herein that shall be purchased by the Customer for its own use and for resale to its customers.

The Company is to furnish and the Customer is to take electric energy under the terms of this agreement for a period of 8 years from the time such service is commenced, and thereafter in successive periods of not less than 2 years each, until either party shall give the other not less than (12 months) notice in writing of its or his election to discontinue the service at the expiration of any of said initial or successive periods.

The electric energy delivered hereunder shall be alternating current at approximately 33,000 volts 3 wire single phase and it shall be delivered at the point where customer's 33,000 volt lines connect with Company's 33,000 volt facilities at Company's Madison Substation, and at Company's Pendleton Substation near Anderson, Indiana, which shall constitute the point of delivery under

this agreement. The said electric energy shall be delivered at reasonably close maintenance to constant potential and frequency and it shall be measured at 33 KV by equipment owned and installed by Company. This metering equipment shall record or register the power delivered to Customer from Company's Madison and Pendleton Substations.

The capacity connected load contracted for by Customer under the tariff named herein is hereby fixed at * _____kva

The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. (a copy of which is attached hereto), as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new tariff incorporate higher rates, the Customer has the option of cancelling the contract prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date of the higher rates.

If the Customer shall make default in the payment of any bill as aforesaid, or shall violate any of the terms or conditions of this contract, and after such default or violation the Company shall deliver at such premises addressed to the Customer, a written notice of its intention to cut off the supply of electricity on account of said default or violation, then the Company shall have the

* Typed provisions marked Paragraphs A and B attached are a part of this agreement.

right to cut off such supply at the expiration of 5 days after giving such notice unless within such 5 days the Customer shall make good such default or violation. Should the Customer continue in default or violation after service has been discontinued, the Company may continue to withhold the supply of electricity until such time as such default in, or violation of, the terms of this agreement has been made good. Any suspension of service by the Company as provided for herein shall not terminate this contract, and the Customer hereby agrees to pay the guaranteed minimum charge specified herein for the period during which service is suspended, in addition to any arrears which may exist.

There are no understandings or agreements outside of this contract and the same shall be in full force and effect when signed by the parties hereto and approved by the Manager of the Company. This agreement cancels and supersedes all previous agreements relating to the supply of the service described herein.

INDIANA & MICHIGAN ELECTRIC COMPANY

By /s/ Arnold Hogan
Vice President

CITY OF ANDERSON

/s/ Louis E. Eggman
President

/s/ S. S. Bill

/s/ [Illegible]
Board of Public Works

TERMS AND CONDITIONS OF SERVICE

APPLICATION.

A copy of the tariffs and standard terms and conditions under which service is to be rendered to the customer will be furnished upon application at the company's office and the customer may elect upon which tariff applicable to his service his application shall be based.

A written application may be required from each customer, which application, when duly accepted by the company, shall constitute the agreement between the company and the customer. A copy of the application will be furnished the customer upon request.

DEPOSITS.

A deposit may be required of the customer before service will be supplied. The company will pay interest on deposits so made in accordance with statutory requirements. Retention by the company, prior to final settlement, of said deposit is not a payment or part payment of any bill for service. The company shall have a reasonable time in which to read and remove the meters and to ascertain that the obligations of the customer have been fully performed before being required to return any deposit.

PAYMENTS.

Bills will be rendered by the company to the customer monthly in accordance with the tariff selected, applicable to the customer's service. Said bills are made payable in the main or branch offices of the company within the time limit specified by the tariff. Failure to receive bill will not entitle customer to any discount or to the remission of any charge for

nonpayment within the time specified. The word "month" as used herein and in the tariffs is hereby defined to be the elapsed time between two successive meter readings ordinarily about 30 days apart, except that when service at a delivery point is first supplied to a customer or is terminated, a "month" may be an elapsed time between two meter readings of (1) not less than 16 days, nor (2) more than 15 days plus the immediate next reading period. In the event the total elapsed time a customer takes service is less than 30 days said period shall be considered as a "month." In the event of the stoppage or the failure of any meter to register the full amount of current consumed, the customer will be billed for such period on an estimated consumption based upon his use of current in a similar period of like use.

The tariffs of the company are net if the account of the customer is paid within the time limit specified in the tariff applicable to his service. Any one monthly delayed payment charge billed against the customer for non-payment of bill may be remitted, provided the customer's previous accounts are paid in full and provided no delayed payment charge has been remitted under this clause during the preceding 6 months.

INSPECTION.

It is to the interest of the customer to properly install and maintain his wiring and electrical equipment and he shall at all times be responsible for the character and condition thereof. The company makes no inspection thereof and in no event shall be responsible therefor. Before furnishing service the company may require: (1) The customer to furnish a certificate or notice of approval issued by a duly recognized authority, such as the National Board of

Fire Underwriters or any underwriter's inspection bureau or any inspector designated by a municipality served by the company; such certificate being to the effect that the wiring and equipment of the customer have been installed in accordance with the requirements of the National Board of Fire Underwriters, or as fixed by the municipality; or, (2) In lieu of the inspection certificate the delivery by the customer to the company of an agreement, duly signed by the owner and tenant of the premises, authorizing the connection to the wiring system of the customer. Any change in or any additions to the original wiring and equipment of the customer will be subject to the above requirements to insure a continuance of service.

No responsibility shall attach to the company because of any waiver of these requirements.

SERVICE CONNECTIONS FROM OVERHEAD DISTRIBUTION SYSTEMS.

The company will when notified designate the location of its service connection and the customer's wiring must be brought outside the building wall nearest the company's service wires so as to be readily accessible thereto and in such manner that all wiring furnished by the company will be in plain view from the street or alley. The inside wiring must extend at least 18 inches beyond the building for the company to attach its wires thereto, and same must be thoroughly and permanently grounded (to the water supply system if possible), provided the maximum difference of potential between the grounded point and any other point in the circuit does not exceed 150 volts and may be grounded when the maximum difference of potential between the ground-

ed point and any other point in the circuit exceeds 150 volts.

Customers desiring an underground service from overhead wires may, at their expense, run service wires from service equipment in buildings to the pole from which connection is to be made, including the necessary run up the side of the pole.

All connections between the customer's service equipment and the company's service wires must be installed as recommended or required by the National Electric Code.

When a customer desires that energy should be delivered at a point or in a manner other than that specified by the company, a charge will be made equal to the additional cost of same.

SERVICE CONNECTIONS FROM UNDERGROUND DISTRIBUTION SYSTEMS.

Where service is supplied from an underground distribution system the customer shall make arrangements with the company for the company to supply and install a continuous run of cable conductors including necessary ducts from the manhole or connection box to the inside of the building wall. The company will render a charge to customer for the value of a portion of cable and duct so installed by the company, such portion being the cable and duct from the curb line of the street to the terminus of cable inside the building and also for that portion of labor and expense incurred by the company in installing such portion of cable and duct for the customer. Company should be consulted on all installations served from the underground system.

COMPANY'S LIABILITY.

The company will use reasonable diligence in furnishing a regular and uninterrupted supply of energy, but in case such supply should be interrupted or fail by reason of an act of God, the public enemy, accidents, strikes, legal process, State or Municipal interferences, breakdowns or injury to the machinery, transmission lines or distribution lines of the company, or extraordinary repairs, the company shall not be liable for damages: for interruptions occasioned from any other cause the liability of the company shall be limited to 5 times the amount which the customer would have paid for energy during the period of such interruptions.

The company shall not be liable to the customer, however, for any loss, injury or damage resulting from the customer's use of his equipment or from the use of the energy of the company or from the connections of the company's wires with the customer's wires and appliances.

The company will provide and maintain in proper operative condition the necessary line or service connections, transformers (when same are required by conditions of contract between the parties thereto), meters and other apparatus which may be required for the proper measurement of and protection to its service. All such apparatus shall be and remain the property of the company.

CUSTOMER'S LIABILITY.

In the event of loss or injury of the property of the company through misuse by, or the negligence of, the customer or the employees of the same, the cost of the necessary repairs or replacement thereof shall be paid to the company by the customer.

Customers will be held responsible for tampering with, interfering with, or breaking of seals of meters, or other equipment of the company installed on the customer's premises, and will be held liable for same according to law. The customer hereby agrees that no one except the employees of the company shall be allowed to make any internal or external adjustments of any meter or any other piece of apparatus which shall be the property of the company.

The company shall have the right at all reasonable hours to enter the premises of the customer for the purpose of [illegible]lling, reading, removing, testing, replacing or o[illegible]e disposing of its apparatus and property, and t[illegible]ht of entire removal of the company's property [illegible]he event of the termination of the contract for any cause.

EXTENSION OF SERVICE.

A. General Provisions.

The transmission or distribution lines of the company will be extended to such points as provide sufficient load to justify such extensions, or in lieu of sufficient load, the company may require a long-term contract or such definite and written guarantee from a customer, or group of customers, in addition to any minimum payment required by the tariff, as may be necessary. This requirement may also be made covering the payment by the customer of the cost of tapping existing transmission or distribution lines for light or power service or both, when such serivce will not provide sufficient load to justify the cost of tapping said lines.

B. Extensions to Supply Year Round Service to Domestic Customers and Farm Customers.

The company will extend its lines to serve domestic customers and farm customers for year round service under applicable tariffs subject to the following conditions:

1. Extensions hereunder shall be built by the company in accordance with its construction standards and shall be single phase unless the company elects to build polyphase lines.

2. In those cases where it is not feasible or practicable to construct lines on public rights of way and it is necessary to secure rights of way on private property or tree trimming permits, the applicant or applicants shall secure the same without cost to the company or assist the company in obtaining such rights of way on private property or tree trimming permits before construction shall commence.

   The company shall be under no obligation to construct lines in event the necessary rights of way or tree trimming permits cannot be so obtained.

LOCATION AND MAINTENANCE OF COMPANY'S EQUIPMENT.

The company shall have the right, if necessary, to construct its poles, lines and circuits on the property, and to place its transformers and other apparatus on the property or within the buildings, of the customer, at a point or points convenient for such purpose, and the customer shall further guarantee the right to use suitable space for the installation of necessary measuring instruments so that the latter may be protected from injury by the elements or through the negligence or deliberate acts of the customer or of any employee of the same.

When the customer desires delivery of energy at more than one point, a separate contract will be required for each separate point of delivery. Service delivered at each point of delivery will be billed separately under the applicable tariff.

USE OF ENERGY BY CUSTOMER.

The tariffs for electric energy given herein are classified by the character of use of such energy. The use of any devices or apparatus whereby the form of energy supplied by the company is altered for the benefit or convenience of the customer, shall not entitle him to any other tariff than is called for by the ultimate use of the energy supplied. Under this rule customers who may install motor generator sets or other converting equipment for the specific purpose of transforming or converting current from one form to another for lighting purposes, shall not be entitled to power tariffs.

With particular reference to power customers it shall be understood that upon the expiration of a contract the customer may elect to renew contract upon the same or another tariff published by the company available in the district in which the customer may reside or operate, and applicable to the customer's requirements, except that in no case shall the company be required to maintain transmission, switching or transformation equipment (either for voltage or form of current change) different from or in addition to that generally furnished to other customers receiving electrical supply under the terms of the tariff elected by the customer.

A customer may not change from one tariff to another during the term of contract except by mutual agreement.

The service connections, transformers, meters and appliances supplied by the company for each customer have a definite capacity and no additions to the equipment, or load connected thereto, will be allowed except by consent of the company.

The customer shall install only motors, apparatus or appliances which are suitable for operation with the character of the service supplied by the company, and which shall not be detrimental to same, and the electric power must not be used in such a manner as to cause unprovided for voltage fluctuations or disturbances in the company's transmission or distribution system. The company shall be the sole judge as to the suitability of apparatus or appliances to be connected to its lines, and also as to whether the operation of such apparatus or appliances will be detrimental to its general service.

No radio, wireless telegraph or wireless telephone antennae may be connected to the company's lines, poles, crossarms, structures, or other facilities.

All apparatus used by the customer shall be of such type as to secure the highest practicable commercial efficiency, power factor and the proper balancing of phases. Motors which are frequently started, or motors arranged for automatic control, must be of a type to give maximum starting torque with minimum current flow, and must be of a type, and equipped with controlling devices, approved by the company. In case of violation of this rule, service may be discontinued by the company until such time as the customer's use of the electric energy furnished hereunder shall conform to these regualtions. Such suspension of service by the company shall not operate as a cancellation of the contract. The customer agrees to notify the company of any increase or decrease in his connected load.

The The company will not supply service to customers who have other sources of energy supply except under tariffs which specifically provide for same.

POWER FACTOR OF LIGHTING EQUIPMENT.

When neon, fluorescent, or other types of lighting equipment having similar power factor characteristics are installed after August 20, 1940, the customer shall furnish, install and maintain at his own expense, corrective apparatus designed to increase the power factor of the individual units or the entire group of such units to not less than 90% lagging.

Where old equipment, including signs, is moved to a new location, it will, under this paragraph, be considered as a new installation.

PARAGRAPH A

It is agreed that the maximum demand established on the City system, as of the date of this Agreement, is 34,000 kva, and that the generating capability of the City's plant, with the largest unit shut down, is 11,250 kva. The initial contract capacity is therefore established at 22,750 kva, the difference between these two figures. The parties agree that in January 1957 and in each succeeding January the City will advise Company in writing of the maximum demand established on the City system during the preceding calendar year and the parties shall determine the generating capability of the City plant at the end of the preceding calendar year with the largest unit shut down, and that the existing contract capacity shall be adjusted upward to a figure equal to the difference between the said maximum demand and the said generating capability adjusted to the nearest 100 kva.

The Company agrees that in time of emergency or on request of City that Company will furnish capacity over and above that constructed for on the following basis:

A. If Company has capacity available to meet the increased requirements of City from its own system over and above the requirements of its other customers, Company will furnish such capacity at the rate set forth herein.

B. If Company does not have capacity available on its own system, but is able to purchase the same from other companies with whom it is interconnected, it will furnish such additional capacity to the City on the City's request, if the City will reimburse the Company for its extra costs, including losses and purchasing the said capacity, plus 10% thereof for administration expenses.

PARAGRAPH B

The customer has developed engineering studies and plans to construct during 1957 and thereafter maintain necessary 33,000 volt lines so that service supplied from Company's Madison and Pendleton Substations shall be to a single distribution system connected together electrically by customer's lines.

INDIANA & MICHIGAN ELECTRIC COMPANY

(See Sheet No. 2 for Applicability)

3rd Revised Sheet No. 8
Cancels
2nd Revised Sheet No. 8
P.S.C.I. No. E-3

TARIFF I. P.

(Industrial Power)

AVAILABILITY OF SERVICE.

Available for power service to customers, whose plants are located adjacent to existing transmission or distribution lines operating at 27,600 volts or over and having capacity sufficient to meet the customer's requirements.

The customer shall contract for a definite amount of electrical capacity which shall be sufficient to meet normal maximum requirements but not less than 10,000 kilovolt-amperes nor more than 60,000 kva, and the company shall not be required to supply capacity in excess of that contracted for except by mutual agreement.

RATE.

PRIMARY PORTION:

For the first 15,000 kva of monthly billing demand as determined below	$2.625 per kva
For all over 15,000 kva of monthly billing demand	$2.275 " "

The customer shall be allowed 242 kwhrs for each kva of monthly billing demand billed in accordance with this section.

SECONDARY PORTION:

Energy in excess of 242 kwhrs per kva of monthly billing demand	$0.0049 per kwhr

RATE ADJUSTMENT.

In any monthly period when metered kwhrs, corrected for power factor, are less than 242 kwhrs per kva of monthly billing demand, the customer shall receive a fuel cost credit on such deficiency in kwhrs at the fuel cost per kwhr (computed from factors contained in Fuel Clause) corresponding to the base price of fuel set forth in Fuel Clause.

MINIMUM CHARGE.

This tariff is subject to a minimum monthly charge equal to the primary portion of the rate set forth above, for each plant. The minimum monthly charge so determined shall be subject to adjustments as determined under the Rate Adjustment and the Fuel Clause.

PAYMENT.

Bills computed under this tariff are due and payable within 15 days of date of bill. If customer should not make payment within 30 days of date of bill, company may suspend delivery of energy until all bills, with interest thereon at the rate of 6% per annum from the date thereof to the date of payment of said bills, have been paid.

FUEL CLAUSE.

This rate is based upon the weighted average cost of fuel consumed by Indiana & Michigan Electric Company at the Breed, Tanners Creek and Twin Branch generating stations.

If during any monthly period the weighted average cost is above the base price of 20.5 cents per 1,000,000 BTU by at least .5 cent, an additional charge during the second month thereafter will be

made on the kwhrs adjusted for billing purposes used during said second month at .00525 cent per kwhr for each full .5 cent increase in the cost of fuel above 20.5 cents per 1,000,000 BTU.

If during any monthly period such weighted average cost is less than the base price of 20.5 cents per 1,000,000 BTU, the bill rendered to the customer for the second succeeding month shall be decreased by an amount equal to the kwhrs adjusted for billing purposes used during said second month at .00525 cent per kwhr if the cost of fuel is in the range 20.00—20.49 cents per 1,000,000 BTU, by twice .00525 cent per kwhr if the cost of fuel is in the range 19.50—19.99 cents per 1,000,000 BTU, etc.

Until such time as the Company's Breed generating station goes into service, the base price of fuel under this clause will be taken as 23.0 cents instead of 20.5 cents as stated above.

Issued by

R. E. DOYLE, JR., Vice President and General Manager
Fort Wayne, Indiana

Issued Effective

INDIANA & MICHIGAN ELECTRIC COMPANY

(See Sheet No. 2 for Applicability)

1st Revised Sheet No. 8A
Cancels
Original Sheet No. 8A
P.S.C.I. No. E-3

TARIFF I. P. (Cont'd.)

(Industrial Power)

MONTHLY BILLING DEMAND.

The billing demand in kva for each plant shall be taken each month as the single highest 30-minute integrated peak in kva, as registered at such plant during the month by a demand meter or indicator, but the monthly billing demand so established shall, in no event, be less than 60% of the contract capacity of the customer at such plant, nor less than 10,000 kva in any month.

DELIVERY VOLTAGE.

The customer shall own, operate and maintain all necessary substations and appurtenances thereto for receiving and purchasing all electric energy at transmission or distribution voltage of not less than 27,600 volts. The company will, however, install, own, operate and maintain necessary metering equipment.

POWER FACTOR.

The rate set forth herein for each plant is based upon the maintenance by the customer of an average monthly power factor of 85%, leading or lagging, as shown by integrating instruments. When the average monthly power factor is above or below

85%, the kwhrs as metered will, for billing purposes, be multiplied by the following constants:

Effective Monthly Power Factor	Constant	Effective Monthly Power Factor	Constant
1.00	.951	.70	1.0835
.95	.965	.65	1.1255
.90	.981	.60	1.1785
.85	1.000	.55	1.2455
.80	1.023	.50	1.3335
.75	1.050		

Constants for other than the effective power factors given in the foregoing table will be determined from the same formula used to determine the given constants.

TERM OF CONTRACT.

Contracts under this tariff will be made for a term of years taking into consideration the size of the load, the location of the load, and the amount of facilities to be furnished by the company in serving the load, but contracts will not be made for initial periods of less than 3 years with self-renewal provisions for successive periods of at least 2 years each. Contracts may be cancelled or reduced in capacity by either party at the end of initial or renewal periods on a minimum of 12 months' prior written notice to the other party.

SPECIAL TERMS AND CONDITIONS.

See Sheets No. 3, 3A, 3B, 3C and 3D for Terms and Conditions of Service.

This tariff is available to customers having other sources of energy supply.

A customer's plant is considered as one or more buildings which are served by a single electrical

distribution system provided and operated by customer. When the size of the customer's load necessitates the delivery of energy to the customer's plant over more than one circuit the company may elect to connect its circuits to different points on the customer's system irrespective of contrary provisions in Terms and Conditions of Service.

This tariff is available to legitimate electric public utilities.

Issued by

C. V. SORENSON, Vice President and General Manager
Fort Wayne, Indiana

Issued September 15, 1954 Effective September 15, 1954

APPENDIX B

January 2, 1963

Mr. Louis E. Eggman, President
Board of Public Works
City of Anderson
Anderson, Indiana

Dear Mr. Eggman:

In 1961 representatives of the City of Anderson and the Indiana & Michigan Electric Company joined together, at your request, to study changes that could be made to improve performance of your generating plant and its coordination with purchase power source. This study showed that by operating only Unit #4 substantial economies can be made by the City. It was suggested that Unit #4 be rehabilitated so that it could be operated at design conditions to achieve the maximum possible efficiency and have available its full capability of 12,500 KVA. The rebuilding of Unit #4 and associated changes in Boiler #7 have now been completed.

You wanted to be assured that the City would have a stable supply of power to meet present day needs and also be in a position to supply any new industry which would make job opportunities for Anderson citizens. Accordingly I & M would be expected to have additional capacity available to Anderson when needed.

In order that the City have all the power required for growth and development at the lowest possible rate, it will be necessary to amend the present agreement between the City of Anderson and the Indiana & Michigan Electric Company, which would accomplish the following:

A. Allow the City to operate the generating plant so as to use only lowest cost fuel both for electric generating and for steam heating service.

B. Revise the contract so as to give the City increased flexibility in scheduling plant operation so as to enable City to realize the lowest generating cost and lower over-all cost for power.

C. Give the City a source of maintenance in the event of an emergency breakdown of City's #4 Unit.

D. I & M to be required to furnish additional capacity as needed by the City.

E. Assure the City of a long range supply of power at reasonable rates subject to approval by the Public Service Commission of Indiana.

Accordingly the following revisions to the agreement dated April 17, 1957 are submitted for your concurrence.

1. Paragraph "A" of the agreement be revised to read as follows:

Paragraph A—Contract Capacity

The Contract Capacity for the initial year of the agreement is hereby set at 31,500 KVA. The Contract Capacity in each succeeding year of this agreement shall be the difference between the maximum 30-minute KVA demand on Customer's electric system during the preceding year and 12,500 KVA.

2. A new Paragraph "C" be added as follows:

Paragraph C—Maintenance Power

In addition to the capacity and energy contracted for under Tariff I.P. the Company agrees to provide Maintenance Power, during any periods

when Customer requires maintenance, repair or overhaul of its 10,000 KW (12,500 KVA) generator and/or other power plant equipment associated with that generator, in accordance with the following. Maintenance Power shall be delivered to Customer in amounts and during periods acceptable to both parties, but the amount of such power is not to exceed 10,000 KW (12,500 KVA). The Operating Committee, provided for under Paragraph D, shall determine and agree on the specific amount of Maintenance Power and Maintenance Energy delivered to Customer and the Maintenance Periods during which such amounts are so delivered.

Maintenance Energy during any billing period shall be the number of kilowatthours equal to the product of 0.5 and the sum of the Maintenance Demands (KW) for all 30-minute intervals in which Company is delivering Maintenance Power. Maintenance Demand (KW) as used above is defined as the difference between Customer's registered demand (KW) on Company in any 30-minute interval in which Maintenance Power is supplied and the KW demand that is then being supplied under the provisions of Tariff I.P., provided that such Maintenance Demand shall in no event exceed 10,000 KW.

Customer shall pay for Maintenance Energy at a rate per kilowatthour equal to the cost for energy so furnished, plus 20% thereof, but in no event shall the rate be less than 8 mills per kilowatthour. Such cost will include the total cost to acquire or produce the energy, plus an appropriate adjustment for transmission losses incurred in transmitting the energy to the delivery point.

8. A new Paragraph "D" be added as follows:

Paragraph D—Operating Committee

To coordinate the operating of their respective facilities and in order to carry out the terms of this agreement, the parties shall appoint a committee of authorized representatives to be known as the "Operating Committee".

Each of the parties shall designate in writing delivered to the other party the person who is to act as its representative on said committee (and the person or persons who may serve as alternate whenever such representative is unable to act). Such representative and alternate or alternates shall each be persons familiar with the generating, transmission, and substation facilities of the system of such party by which it has been so designated, and each shall be fully authorized to cooperate with the other representative (or alternates). Such representatives (or alternates) shall, subject to the declared intentions of the parties herein set forth and to the terms hereof and the terms of any other agreement subsequently arrived at between the parties, be fully authorized to cooperate and agree upon all matters relative to this agreement which are not specifically provided for herein.

4. The initial term of the agreement shall be extended for a 5 year period and will thereafter be renewed automatically in 2 successive periods of 5 years each unless either party shall give the other not less than 24 months notice in writing of its election to discontinue the service at the expiration of any such 5 year periods.

Except as expressly modified by this supplemental agreement the terms and conditions of the Agreement

dated April 17, 1957 shall be and remain in full force in effect.

If you concur with the aforementioned revisions, please have this Supplemental Agreement executed and approved by the duly authorized officials of the City of Anderson, Indiana.

Yours very truly,

INDIANA & MICHIGAN ELECTRIC COMPANY

/s/ R. E. Doyle, Jr.
R. E. DOYLE, JR.
Vice President and
General Manager

RMK:ljs

Acceptance by Board of Public Works

CITY OF ANDERSON

By /s/ Louis E. Eggman, Pres.

/s/ S. S. Bill

/s/ [Illegible]

Dated: December 11, 1963

Approved by Mayor

CITY OF ANDERSON

By /s/ Ralph R. Ferguson
RALPH R. FERGUSON

Dated: December 11, 1963

APPENDIX C

INDIANA & MICHIGAN ELECTRIC COMPANY
419 North Walnut Street—Muncie, Indiana 47305

[SEAL]

September 30, 1969

Mr. Frank Yarling,
Anderson Municipal Light and Power,
Anderson, Indiana 46011.

Dear Mr. Yarling:

The present contract, dated April 17, 1957, between the City of Anderson and Indiana & Michigan Electric Company, covering electric service to the City of Anderson, is based on a contract capacity of 22,750 KVA. This contract capacity was increased to 30,250 KVA in 1962, to 36,750 KVA in 1963, and to 56,750 KVA on December 31, 1966. According to our billing records, your maximum demand has now reached 80,800 KVA.

As discussed in recent conversations, it appears appropriate to enter into a new contract agreement since many of the provisions outlined in the old agreement are obsolete and are no longer required. We are sure you will agree that a more realistic contract capacity for your facilities, based on your present requirement and foreseeable load growth, should be decided upon.

A copy of a new agreement is attached for your consideration and approval. It is based on our Industrial Power Tariff (I.P.) and indicates a contract capacity of 77,000 KVA, and will become effective January 1, 1970.

If this new agreement is acceptable to you, would you please have it properly executed by the Board of

Public Works and return both copies to the writer. The date, at the top of the agreement, will be completed when the contract is accepted and signed by our management.

If you have any questions regarding this new agreement, please call the writer.

Yours, very truly,
/s/ C. Wayne Roahrig
C. WAYNE ROAHRIG

CWR:AC
Enc.

APPENDIX "A" TO AGREEMENT DATED ——— ——— BY AND BETWEEN INDIANA & MICHIGAN ELECTRIC COMPANY AND CITY OF ANDERSON:

PARAGRAPH "A"

The contract capacity hereby reserved and contracted for by the customer for the first three (3) years of the term of this Agreement is hereby fixed at 77,000 KVA. Thereafter, on the successive two (2) years' anniversary date of the Agreement, as so stated in Tariff I.P. that the customer takes service under this Agreement, the contract capacity shall automatically be adjusted to be the equivalent to the customer's normal maximum requirements as represented by the single highest 30-minute integrated peak in KVA during any month in the next preceding year, adjusted to the nearest 100 KVA; provided, however, that the contract capacity in any year shall in no event be less than 77,000 KVA.

PARAGRAPH "B"

This agreement cancels and supersedes Agreement dated April 17, 1957, between Indiana & Michigan Electric Company and City of Anderson for supplying electric service to the City of Anderson.

THIS AGREEMENT * entered into this _____ _____ day of _____ by and between the INDIANA & MICHIGAN ELECTRIC COMPANY, hereafter called the Company, and City of Anderson, by and through its Board of Public Works Anderson, Indiana, or his or its heirs, successors or assigns, hereafter called the Customer,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree with each other as follows:

The Company agrees to furnish to the Customer, during the term of this Agreement, and the Customer agrees to take from the Company, subject to Company's standard Terms and Conditions of Service as regularly filed with the Public Service Commission of Indiana, all the electric energy of the character specified herein that shall be purchased by the Customer for its own use and for resale to its customers.

The Company is to furnish and the Customer is to take electric energy under the terms of this Agreement for a period of three (3) years from the time such service is commenced, and thereafter in successive periods of not less than two (2) years each, until either party shall give the other not less than 12 months' notice in writing of his or its election to discontinue the service at the expiration of any of said periods. The date that service shall be deemed to have commenced under this Agreement shall be January 1, 1970.

The electric energy delivered hereunder shall be alternating current at approximately 34,500 volts 3 wire

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* Including Appendix "A" attached on the reverse side hereof and made a part hereof.

single phase and it shall be delivered at the point where customer's 33,000 volt lines connect with Company's 33,000 volt facilities at Company's Madison Substation and at Company's Pendleton Substation near Anderson, Indiana which shall constitute the point of delivery under this Agreement. The said electric energy shall be delivered at reasonably close maintenance to constant potential and frequency and it shall be measured by a meter or meters owned and installed by the Company and located at the Company's Madison & Pendleton Substations. This 34 KV metering equipment shall record or register the power delivered to customer.

The reservation of capacity contracted for by Customer under the tariff named herein is hereby fixed at 77,000 kva.

The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as said tariff is in effect; and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the Agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates.

There are no unwritten understandings or agreements relating to the service hereinabove provided.

This Agreement cancels and supersedes all previous agreements relating to the purchase by Customer and sale by Company of electric energy at Customer's premises as referred to above.

This Agreement shall be in full force and effect when signed by the authorized representatives of the parties hereto.

INDIANA & MICHIGAN ELECTRIC COMPANY

By CITY OF ANDERSON